

FEDERAL CIRCUIT COURT OF AUSTRALIA

SINGH v MINISTER FOR IMMIGRATION & ANOR [2015] FCCA 2805

Catchwords:

MIGRATION – Administrative Appeals Tribunal (Migration and Refugees Division) – Skilled (Residence) (Class VB) visa – bogus document – whether Public Interest Criterion 4020 was enlivened – no jurisdictional error – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 97, 476

Migration Regulations 1994 (Cth), reg.1.03, cl.885.224, PIC4020

Cases cited:

Batra v Minister for Immigration and Citizenship [2013] FCA 274

Mudiyanselage v Minister for Immigration and Citizenship [2013] FCA 266

Sharma v Minister for Immigration and Citizenship [2014] FCCA 2821

Singh v Minister for Immigration and Citizenship & Anor [2012] FMCA 145

Trivedi v the Minister for Immigration and Border Protection [2014] FCAFC 42

Applicant:	GURNEET SINGH
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	ADMINISTRATIVE APPEALS TRIBUNAL
File Number:	SYG 1461 of 2015
Judgment of:	Judge Street
Hearing date:	8 October 2015
Date of Last Submission:	8 October 2015
Delivered at:	Sydney
Delivered on:	8 October 2015

REPRESENTATION

Counsel for the Applicant: Ms A Poljak
Solicitors for the Applicant: Christopher Levingston & Associates
Counsel for the Respondents: Mr G Johnson
Solicitors for the Respondents: Sparke Helmore

ORDERS

- (1) The name of the Second Respondent be changed to the Administrative Appeals Tribunal and the requirement to lodge any further document in that regard is dispensed with.
 - (2) The Amended Application is dismissed.
 - (3) The First Respondent to pay the Applicant's costs fixed in the amount of \$5800.
- (i)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT SYDNEY

SYG 1461 of 2015

GURNEET SINGH

Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION

First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL

Second Respondent

REASONS FOR JUDGMENT

1. This was an application for a Constitutional writ within the Court's jurisdiction under s.476 of the *Migration Act 1958* (Cth) in respect of a decision of the Tribunal made on 19 May 2015 affirming a decision of the delegate not to grant the applicant a Skilled (Residence) (Class VB) visa.
2. The applicant applied for the grant of the visa on 21 April 2009 and provided in support an assessment by the Trades Recognition Australia, supplied assessment, dated 19 March 2008 in respect of the nominated occupation of pastry cook. That nominated occupation on the application gave rise to points for the occupation that were relevant to the processing of the visa application. The Trades Recognition Australia assessment, dated 19 March 2008, were referred to in the

application as to the skills assessment and work experience for the purpose of migration to Australia.

3. The occupation nominated was that of pastry cook, and the reasons in support of the assessment that was favourable to the applicant noted that evidence was provided that the applicant has satisfied 900 hours directly related work experience, set out in s.12 of the UAC. The document from the Trades Recognition Australia also had an application assessment sheet that purported to record a positive answer in relation to 900 hours work experience. That Trades Recognition Australia skills assessment was obtained by the applicant in circumstances where there was provided to the Trades Recognition Australia a document headed Bakers Hut Bread Suppliers, signed by Deniz Kordemir, and purported to certify the applicant had worked in the bakery from 8 March 2007 to 15 February 2008 and had completed 1020 hours of professional pastry cook experience.
4. The delegate found that the applicant had given, or caused to be given, a bogus document in relation to the visa application to an officer and that the applicant did not satisfy PIC4020(1). The delegate's decision, made on 17 November 2014, identified cl.885.224 of schedule 2 of the regulations, identifying a mandatory requirement for the grant of the visa as follows:

The applicant:

(a) satisfies public interest criteria 4001, 4002, 4003, 4004, 4005, 4010 and 4020; and

(b) if the applicant had turned 18 at the time of application - satisfies public interest criterion 4019.

5. The delegate set out the public interest criteria 4020 in Schedule 4 of the Regulations, which is as follows:

(1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

(a) the application for the visa; or

(b) a visa that the applicant held in the period of 12 months before the application was made.

(2) The Minister is satisfied that during the period:

(a) starting 3 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse the application;

the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).

(2A) The applicant satisfies the Minister as to the applicant's identity.

(2B) The Minister is satisfied that during the period:

(a) starting 10 years before the application was made; and

(b) ending when the Minister makes a decision to grant or refuse the application;

neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).

(3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

(4) The Minister may waive the requirements of any or all of paragraphs (J)(a) or (b) and subclause (2) if satisfied that:

(a) compelling circumstances that affect the interests of Australia; or

(b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;

justify the granting of the visa.

(5) In this clause:

information that is false or misleading in a material particular means information that is:

(a) false or misleading at the time it is given; and

(b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

6. At the time of the delegate's decision, the definition of "bogus document" was identified by reg.1.03 and as set out in s.97. At the time of the determination by the Tribunal in the application for review, the definition for "bogus document" was set out in s.5(1) of the Act as follows:

"bogus document " , in relation to a person, means a document that the Minister reasonably suspects is a document that:

(a) purports to have been, but was not, issued in respect of the person; or

(b) is counterfeit or has been altered by a person who does not have authority to do so; or

(c) was obtained because of a false or misleading statement, whether or not made knowingly.

7. Before the Tribunal, the applicant's representative sought to argue that the PIC4020 had no application in the present case because the Trades Recognition Australia was not an approved assessor under the Regulations at the time of issuing of a skills assessment by reason of which the 60 points were required on the application for the visa.
8. It was contended that the Trades Recognition Australia document was of no legal effect, and was not relevant to the criteria that the Minister was required to consider at the time of the making of the decision. The applicant contended before the Tribunal that this approach was supported by the decision in *Singh v Minister for Immigration and Citizenship & Anor* [2012] FMCA 145 as well as the decision in *Sharma v Minister for Immigration and Citizenship* [2014] FCCA 2821. The Tribunal relevantly found:

45. Based on the evidence before it, the Tribunal finds that the review applicant submitted with his application for the skills assessment to TRA a work reference letter from Bakers Hut as evidence that he worked as a volunteer pastry cook at Bakers Hut from 8 March 2007 to 15 February 2008. A copy of this letter was

also provided to the Department by the applicant on 16 October 2014.

46. Based on the evidence before it, which the Tribunal considers of sufficiently probative value, the Tribunal finds that the work reference letter given to TRA and the Department contained a false statement that the review applicant completed 1020 hours' work experience as a pastry cook at Bakers Hut. The Tribunal finds that the statement in the work reference letter regarding the applicant's 1020 hours' work experience at Bakers Hut was purposefully false or misleading.

47. Accordingly, the Tribunal finds that the skills assessment of 19 March 2008 (reference/receipt number TRA08/062206264) from TRA was obtained because of a false or misleading statement and that the skills assessment is a bogus document, being a document which the Tribunal reasonably suspects was obtained because of a false or misleading statement, whether or not made knowingly (s.5(1) of the Act).

48. Based on the evidence before it, the Tribunal is satisfied that the applicant submitted the TRA skills assessment dated 19 March 2008 to the Department with his application for a subclass 885 visa as evidence of successful skills assessment in his nominated occupation of a pastry cook.

49. Accordingly, the Tribunal is not satisfied that there is no evidence that the review applicant has given, or caused to be given, to the Minister, or an officer of the Department, the Tribunal or a relevant assessing authority a bogus document or information that is false or misleading in a material particular in relation to his application for a subclass 885 visa. Accordingly, the Tribunal finds that the review applicant does not meet the requirements of paragraph 4020(1)(a).

9. The Tribunal then considered whether the criteria under PIC4020 should be waived. This was a case where the applicant's legal representative had instructed the Tribunal to determine the application on the papers, and it was clearly open to the Tribunal to find that it was not satisfied that the requirements in PIC4020(1) should be waived. It was in those circumstances that the Tribunal found the applicant did not meet the requirements for a subclass 887 visa and affirmed the decision not to grant the applicant a Skilled (Residence) (Class VB) visa.

10. The amended application raises the following grounds:

1. The Second Respondent, the Migration Review Tribunal ("the Tribunal") fell into jurisdictional error by finding that the Public Interest Criterion (PIC) 4020 was enlivened in the current case.

Particulars

(a) It was not open to the Tribunal to find that the Applicant in the first instance application (Visa subclass 885) was required, at the time of application to evidence a skills assessment. At the time of the making of the application [21 April 2009] the requirement for a skills assessment pursuant to cl.885.222 (1) of Schedule 2 to the Migration Regulations 1994 ("the Regulations") was by reason of the failure to appoint TRA as the relevant skills assessing authority, had the effect of rendering the regulation invalid as it was incapable of being met. That being the case, there was no requirement at the time of the making of the application for a valid skills assessment thus rendering any purported skills assessment at the time of the making of the application not material to the visa subclass.

(b) It is a requirement of PIC 4020 that the relevant information be false or misleading in a material particular [cl.4020 (5) of the Regulations]. The Tribunal erred in finding at [38] of the decision record that a valid skills assessment was a requirement at the time of making the application.

2. The Second Respondent in hearing the matter de novo and in making a decision absent the Applicant's oral evidence fell into jurisdictional error by making a finding that PIC4020 (1) was enlivened by reason of the giving of false evidence which was either in the form of a bogus document or was false and misleading in a material particular by reason of the material before it.

Particulars

(b) The finding of the Tribunal that cl. 885.224(a) of the Regulations applied at the time of the decision dated 17 November 2014, is wrong in law. Clause 885.224(a) of the Regulations arises by reason of the importing into the statutory scheme on 2 April of 2011, through criterion 885.224(a), the requirement that the Applicant meet the requirements of PIC 4020 at the date of the decision. The

TRA was not validly appointed until 1 October 2011. [IMMI 11/068; SLIF2011L02011] It follows therefore that at the time of decision, the incorporation of cl. 885.224(a) had the effect of requiring the applicant not to give or cause to be given a bogus document or information that is false and misleading in a material particular; that requirement could not be made out because criterion 885.221(1) was a time of application and not a time of decision criterion. Thus the purported skills assessment was not material to any statutory requirement other than cl.885.224(a) which imported PIC4020 into the statutory scheme.

Thus, the reception of evidence and the elucidation of facts and the making of findings in respect of those matters [the skills assessment] was misconceived by reason of it not material to the task of the Tribunal was required to undertake in respect of the satisfaction of cl. 885.222(1) of the Regulations. The skills assessment could not inform the decision of the Tribunal to the extent asserted. The Tribunal in effect erred by applying the wrong test.

3. The Tribunal erred at [381] and [39] of the decision record in finding that Singh v Minister for Immigration and Citizenship & Anor [2012] FMCA 145 was not applicable because it was distinguishable from the present case.

4. The Tribunal erred at [40] of the decision record in finding that Sharma v Minister for Immigration and Citizenship [2014] FCCA 2821 was not applicable.

11. In relation to ground 1, counsel for the applicant contended that the absence of the status of the Trades Recognition Australia as being an authorised assessor under the regulations at the time that the skills assessment was made meant that the document was not one which enlivened the obligations under PIC4020. The applicant contended that the absence of being an approved assessor at the time of making the skills assessment meant that the skills assessment was not relevant to the criteria that the Minister may consider when making a decision on the application.
12. The applicant also submitted that in those circumstances, the document provided by the Trades Recognition Australia was not one that could said to be “a bogus document or information that is false or misleading in a material particular in relation to the application for the visa” within

the requirements of PIC4020(1)(a). It was not disputed that the amendment to the regulations that introduced PIC4020 had application to the review by the Tribunal at the time of the decision.

13. The applicant submitted that the reasoning in *Sharma* at [30] in the last sentence supports the conclusion that the Trades Recognition Australia document issued on 19 March 2008 when the Trades Recognition Australia was not an approved assessor was information that was of no relevance to PIC 4020:

PIC 4020 is concerned that there be no evidence that an applicant has given false or misleading information to any of the entities or persons to which it refers. The entities or persons to which it refers are:

... the Minister; an officer; the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth ...

With the exception of the Tribunal, all of those references are to offices or roles held by natural or corporate persons, not to those natural or corporate persons themselves. That indicates that for information to engage the operation of PIC 4020 it must be given to a person when the person is the holder of the statutory office or the performer of the statutory role and, having regard to PIC 4020's statutory context, it is probable that it must be given to them in that capacity. For instance, false and misleading information given to a private member of parliament who, by the time of decision, has been appointed to be the Minister, would not be caught by PIC 4020. Similarly, as the applicant's address suggested, information given to an individual before he or she became an officer of the Minister's department or a Medical Officer of the Commonwealth would not be caught by PIC 4020. I therefore find that, unless at the time allegedly false or misleading information is given to a person that person holds one of the offices or performs one of the roles referred to in PIC 4020, the information is of no relevance to PIC 4020.

14. Counsel for the applicant relied upon the fact that the application of PIC4020 in the regulations was the subject of the heading to cl.885.22 "*Criteria to be satisfied at time of decision*". Counsel for the applicant submitted that as the relevant assessment approval had not been given, and not only was the document of no legal effect for the purpose of the regulations, but it was not relevant, and therefore not a document that

could be said to be a bogus document or information that was false or misleading in a material particular in relation to an application for the visa.

15. Counsel for the applicant also submitted that PIC4020 should be read as a whole, and that the reference to information that is false or misleading in a material particular in PIC4020(5) was of significance in identifying, not merely that the information had to be false or misleading at the time it was given, but, materially, that it had to be *“relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.”*
16. Counsel for the applicant contended that the words “in relation to” in PIC4020(1) should be read as contracting the relevant document or information to a document or information that was the criteria or was part of the criteria that the Minister may consider when making a decision on the application. By reason of the fact that the Trades Recognition Australia skills assessment dated 19 March 2008 was of no legal effect at the time it was made, it was contended that PIC4020(1) should be construed as excluding a document by the unauthorised assessor as being either a bogus document or information within PIC4020(1).
17. In relation to the proper construction of PIC4020, it is relevant, to take into account the explanatory statement that accompanied the publication of the amending regulations in 2011, which provided:

“Sections 97 to 106 of the Act, in general, place obligations on applicants to provide correct information and to correct any incorrect information whether at the time of application or subsequently prior to visa grant. In circumstances where incorrect information is provided, the Minister may cancel under section 109 of the Act any visa that has been granted. The application of section 109 of the Act depends on a visa having been granted.

Section 65 of the Act provides that after considering valid visa application, the Minister must grant the visa if the applicant has satisfied the prescribed criteria, provided that there are no statutory bars to the visa being granted. Currently, the power to refuse a visa application on the basis that the visa applicant (sic)

has false or misleading information is extremely limited. The relevant Schedule 2 criteria are not of general applicability, and relate only to false or misleading information provided by a primary visa applicant to satisfy certain specific requirements. Further, it is common practice that a visa applicant will seek to withdraw the bogus documents, or false or misleading information or find alternative methods of satisfying the relevant visa criteria without relying on the false information. In circumstances where this occurs, a decision maker is required to accept the request to withdraw the information and continue to process the application.”

18. It is also relevant to take into account the purpose of the PIC 4020, which was directed to information or documents which are purposely untrue; see *Trivedi v the Minister for Immigration and Border Protection* [2014] FCAFC 42 at [42] to [44] and [49].
19. When that purpose is taken into account, there is no warrant for contracting the scope of the work done by the words “in relation to” found in PIC4020(1) so as to exclude a document that was made by an unauthorised assessor but was nonetheless a bogus document given to the Minister or an officer in the process of the application for a visa. Counsel for the first respondent emphasised that the disjunctive in PIC4020(1) identified two different categories being addressed, the first a bogus document, the second information that is false or misleading in a material particular.
20. Counsel for the first respondent submitted that it was in those circumstances that it is clear that the reference in PIC4020(5) to the meaning of false or misleading in a material particular in PIC4020 did not modify or contract the meaning of “bogus document” as defined in section 5(1) referred to above.
21. Counsel for the respondent submitted that the circumstances of the present case were distinguishable from those considered in the matter of *Singh* as at the time of the decision by the Tribunal that Trades Recognition Australia was an authorised assessor and, further, that *Singh* was not a decision that addressed a bogus document. I accept that the decision in *Singh* can properly be distinguished, as it was concerned with information that was false or misleading in a material

particular as identified in paragraph 68 and did not determine the issue of construction that arises in the present case.

22. I also accept the first respondent's submission that the decision in *Sharma* can be distinguished, again on the basis that it was not addressing the issue of a bogus document and the construction issue that arises in those circumstances. I accept the first respondent's submission that the reasoning of the Court in *Batra v Minister for Immigration and Citizenship* [2013] FCA 274 at [60] and [61] supports the reasoning of the Tribunal in the present case.
23. Further, in my opinion, the reasoning in *Batra v the Minister for Immigration and Citizenship* is inconsistent with the proposition that the unauthorised assessor position of Trades Recognition Australia as at the date of the skills assessment meant that it was information that was not relevant to PIC4020. To the extent that *Sharma v the Minister for Immigration* at [30] supports a contrary position, it is, in my opinion, inconsistent with the decision *Batra v the Minister for Immigration and Citizenship*, in respect of which this Court is bound.
24. Further, in my opinion, the decision in *Mudiyanselage v Minister for Immigration and Citizenship* [2013] FCA 266 at [23] to [31] is consistent with the reasoning of the Tribunal in the present case. Further, in my opinion, the reasoning in *Mudiyanselage* is also inconsistent with the proposition advanced by the applicant that the PIC4020 had no application in the present case because the Trades Recognition Australia was not an authorised assessor at the time of making the document on 19 March 2008.
25. Again, to the extent that *Sharma* is said to support the contrary proposition, in my opinion, it is inconsistent with *Mudiyanselage*, and this Court is bound by the principles identified in that decision. Further, given the points system in the visa application, the bogus document facilitated the applicant's score in the application and was in my opinion a bogus document in relation to the visa application. In these circumstances, I find that ground 1 of the application fails to make out any jurisdictional error. I find the Tribunal was correct to apply the public interest criterion to the alleged bogus document and that the alleged bogus document was a document given to the Minister or an officer in relation to the application for the visa.

26. In relation to ground 2, the absence of the applicant in relation to the giving of oral evidence was a matter of choice by the applicant instructing the Tribunal to determine the matter on the papers, and, in substance, this ground is advancing the same ground as advanced under ground 1, albeit that the applicant has contended that the Tribunal erred by applying the wrong test. For the reasons I have given, I am satisfied the Tribunal applied the correct test in relation to the bogus document and that the decision of the Tribunal was not wrong in law.
27. I note that this is not a case where any argument was advanced that the regulations are invalid. For these reasons, ground 2 fails to make out any jurisdictional error. In my opinion, the Tribunal was correct in distinguishing the decisions of *Singh* and *Sharma*, and no jurisdictional error is made out by grounds 3 and 4. In these circumstances the amended application is dismissed.

I certify that the preceding twenty-seven (27) paragraphs are a true copy of the reasons for judgment of Judge Street

Associate:

Date: 21 October 2015